In The

Supreme Court of the United States

October Term, 1940

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*No.*_____

CITIES SERVICE OIL COMPANY,
Petitioner

vs.

B. P. DUNLAP, ET AL,
Respondents

Brief in Support of Petition for Writ of Certiorari

May It Please the Court:

Petitioner presents this brief in support of its petition for writ of certiorari and to avoid prolixity, reference will be made to the petition wherever appropriate.

Opinions of This Court and Court Below

Same as ante, pp. 1-2.

Statement of Grounds on Which Jurisdiction Is Invoked

Same as ante, pp. 11-15.

Statement of the Case

Same as ante, pp. 2-10.

Specifications of the Assigned Errors Intended to Be Urged

1. The Honorable Circuit Court of Appeals failed to follow the decision of this Honorable Court in the case at bar in that it held that as against petitioner, a bona fide purchaser, the call for the Davis corner should be disregarded in favor of the distance of 440 yards, to the end that the partition deed was effectually reformed by striking the adjoinder call.

2. The Honorable Circuit Court of Appeals failed to follow the local law of Texas in construing the deed and oil and gas lease, thereby rendering an opinion contrary to the decisions of this court holding that Federal Courts follow State court rules of evidence and constructon of deeds in the trial of cases involving title to lands.

3. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that a bona fide purchaser acquires the legal title to all land included between adjoinders called for in his deed if there is nothing on the face of the conveyance to put him on inquiry as to the claims of his predecessors in title arising out of their alleged mistake in calling for such adjoinders when they intended to stop at the distances given.

4. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that each and every corner created by and called for in partition deeds and each and every corner existing at the time of the partition and called for in the deeds constitute one block or system of surveys and all tracts are to be lo-

cated together as one block or one large tract in so far as they call for each other.

5. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that where a tract of land is partitioned among the joint owners, the presumption obtains that the whole of the land is partitioned unless some portion thereof is expressly excepted and the presumption becomes conclusive when the rights of innocent purchasers are involved.

6. The Honorable Circuit Court of Appeals failed to follow the local law of Texas which does not admit the introduction of parol evidence to vary the terms of a deed to prove that an adjoinder was called for through mistake, after the rights of a bona fide purchaser have intervened.

7. The Honorable Circuit Court of Appeals failed to follow the local law of Texas which does not admit the introduction of parol evidence to show the locations of objects not called for in a deed where such objects are at places different from the adjoinders.

8. The Honorable Circuit Court of Appeals failed to follow the local law of Texas in holding that the partition deed was latently ambiguous because the distances were insufficient to reach the adjoinders.

9. The Honorable Circuit Court of Appeals failed to follow the local law of Texas that where there is a conveyance of land adjacent to or adjoining a roadway, public or private, opened or closed, title to the road passes to the grantee by virtue of such conveyance, subject to the easement, unless there is in the

conveyance language expressly rebutting such construction or specifically indicating a contrary intent.

Argument

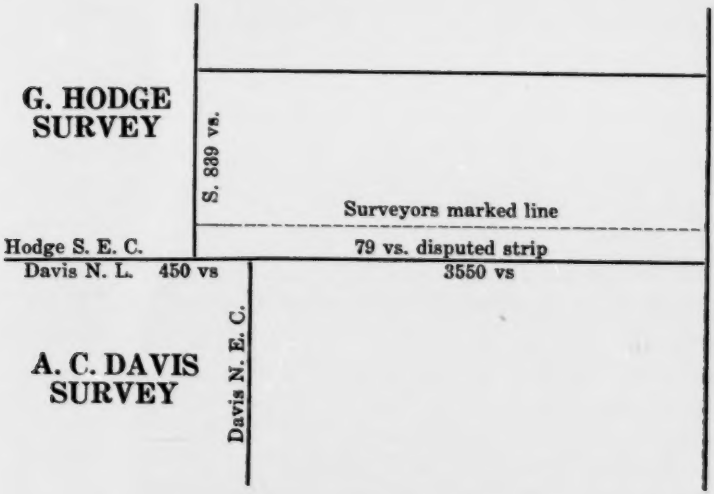
I.

In Texas calls for adjoinders override distances and after the rights of a bona fide purchaser have intervened a deed must be construed so as to vest such purchaser with title to all land situated between the adjoinders, even though they were mistakenly included in the deed.

In *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, a bona fide purchaser was permitted to recover the land adjacent to the adjoinder called for, even though in reaching such call a greater distance was required than that given in the deed, and even though the surveyor's footsteps showed he stopped at the distance given in the deed and marked the boundary line 75 varas away from the adjoinder called for, believing he was at the adjoinder.

The facts are very similar to those involved in the case at bar and were as follows: pursuant to a compromise agreement Garrison conveyed to Stephens a tract of land supposedly containing 640 acres. The deed called to begin at the Northwest corner of the tract conveyed and run "*South 839 varas to the Southeast corner of said Hodges survey, on the North*

boundary line of the A. C. Davis survey." This call located the West line of the tract conveyed. The deed called "*thence East at 450 varas, said Davis' Northeast corner, at 3550 varas, the East boundary line of said Frost survey.*" **This call located the South line of the tract conveyed. The distance called for in the West boundary line of 839 varas did not reach the Davis survey by some 79 varas but it reached the line actually run at the time the survey was made.** The strip lying between the line run by the surveyor and the North boundary line of the Davis tract constituted the area in dispute. We have sketched a plat illustrating the questions of boundary decided by Associate Justice Stayton:



Sometime after the conveyance Stephens, the grantee, moved his fence upon the most Southern line, being the true line of the Davis survey, and took actual

possession of the disputed line. Stephens subsequently sold the land to Crowell, who was the Appellee before the Supreme Court. Garrison sued Crowell for the 79 varas strip *upon the theory that the survey stopped at the called distance of 839 varas and a line was marked for the South line of the tract conveyed and such line did not coincide with the Davis line.* We therefore see that (a) an actual survey was made on the ground and the South boundary line as surveyed was distinctly marked on the ground 79 varas North of the Davis line called for; (b) the surveyor and parties had erroneously thought that the line they marked was the North line of the Davis survey and therefore they were mistaken as to the location of the adjoinders called for; (c) Stephens, the grantee, actually entered into possession of the 79 vara strip and built his fence along the true North line of the Davis survey; (d) Crowell purchased the tract from Stephens, his deed containing the same description as that from Garrison to Stephens; (e) *Crowell had no knowledge that the surveyor had stopped short of the adjoining calls a distance of 79 varas and hacked the South line 79 varas North of the adjoinder called for;* (f) *the hacked line and marked trees were not called for, the deeds calling only for adjoinder and course and distance.*

In holding that Garrison, the original grantor, could not prevail against Crowell the court said:

> **"If it be determined that Crowell is a bona fide purchaser, without notice, of the land in question the judgment must be affirmed without reference to any other question presented by this**

appeal, and we have no doubt that he must be so held. It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line; therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant. He found Stephens in possession of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase. The case of Houston v. Sneed, 15 Texas 307, cited by appellant's counsel, does not sustain the proposition submitted by them upon this point. In that case Sneed was held not to be an innocent purchaser, because, at the time of his conveyance, Houston was in actual possession of the land up to the disputed line. This was considered as constructive notice to him of Houston's claim. But the court said: 'Had there been no settlement up to the agreed line, and no notice to him of it, he might have insisted upon the line originally established between Houston and McKinney called for by his deed.' It is evident that, in so far as the opinion bears upon this case, the authority is against appellant and not in his favor. The court below found against appellant upon the main proposition presented by his pleading; that is,

> **that the Hodges corner and Davis line were called for in the deed by mistake, and we are inclined to think that this finding is correct. But we need not consider that question. Appellee Crowell being a bona fide purchaser for value, appellant cannot recover."** (Pp. 628-629.)

The only difference in the facts in the case at bar and in the *Crowell* case are in favor of petitioner's contentions for the following reasons:

First: In the *Crowell* case, the surveyor, Garrison and Stephens were mistaken as to the location of the adjoinder. In our case Simmons and the four Rogers heirs knew the location of the Wiley Davis Northeast corner. The mistake in the deed from Garrison to Stephens was as to the actual location of the land described, while in the case at bar if there was any mistake it was not one as to the location of the Wiley Davis Northeast corner, but was in including more land than the heirs intended. We think in this respect our case is stronger than the *Crowell* case and for all the more reason the rights of an innocent purchaser should be protected. Respondents took the position that the surveyor did not know the location of the Wiley Davis corner and if such position was correctly taken, then the facts are identical with the *Crowell* case. The findings by the court are that the surveyor and the Rogers heirs knew the location of the Davis corner.

Second: In the *Crowell* case, Stephens, the original grantee from Garrison, took possession of the disputed strip and was in possession at the time he con-

veyed to Crowell. In the case at bar the disputed strip actually constituted a road and certainly respondents were not in possession of the road. The fact that Stephens was in possession of the disputed strip negatived the possession of Garrison and therefore there was nothing to charge Crowell with notice of Garrison's claim to the strip. The heirs of Louisa Rogers were not in possession of the road, and when Chandler and petitioner acquired the oil and gas lease there was no possession of respondents to charge petitioner with notice that respondents were claiming some interest in the road. On the other hand, petitioner was entitled to rely upon the presumption that the four heirs intended for the title to the road to pass to J. F. Rogers because they did not expressly reserve such title in the partition deed.

Third: In the *Crowell* case the trial court found that the call for adjoinder had not been inserted through mistake, although he found that the surveyor stopped short of the adjoinder 79 varas and marked the South line. The court in the case at bar found that the call for the Wiley Davis Northeast corner was inserted through mistake because he found that the surveyor stopped 66 feet short of the Wiley Davis Northeast corner and marked a line South. Certainly, if there was no mistake in the *Crowell* case, there was none in the case at bar because in following the footsteps of each surveyor the courts found that they stopped short of the adjoinder and marked a line. Justice Gaines brushed aside the finding of the trial court that the adjoinder was called for through mistake, saying:

"but we need not consider that question. Appellee Crowell being a bona fide purchaser for value, Appellant could not recover."

We therefore think that extrinsic evidence was inadmissible and could not form the basis for the decree entered in this case. The court should have concluded as a matter of law petitioner was an innocent purchaser and acquired title to the land adjacent to the Wiley Davis Northeast corner.

II.

In Texas calls for adjoinders created in a partition are as conclusive and controlling as are calls for adjoinders existing prior to the partition. In departing from this rule the Honorable Circuit Court attempted to make a distinction between the case at bar and Garrison v. Crowell, which does not in fact exist.

The bounds in the J. F. Rogers deed were fixed by three adjoinders, viz: the Northeast corner (place of beginning) was fixed at the W. H. Rogers Northwest corner, a corner that did not exist before the partition; the Northwest corner in the order of calls, was fixed at the Wiley Davis Northeast corner (the only corner called for that existed before the partition); and the balance of lines and corners were fixed by metes and bounds except the most southerly Northeast corner was fixed coincident with "W. H. Rogers

line" (a corner that did not exist before the partition). See plat, ante, p. 6.

In the opinion of December 2, 1940 (R. 330-334) the court held that there was neither indefiniteness nor contradiction on the face of the partition deed and no patent ambiguity. It stated that in an effort to trace the lines on the ground a discrepancy was found in that the distance from the beginning corner to the Davis corner was 66 feet more than 440 yards but that such discrepancy did not amount to an ambiguity because it was settled in Texas that distance is overruled by a call for a fixed object. It concluded, however, that an ambiguity existed because after leaving the Davis corner it developed that the beginning point was not reached by 66 feet since there were no other fixed objects mentioned in the deed. Based on this fact it held that the latent ambiguity required construction justifying a resort to extrinsic evidence to explain the true meaning. It wholly ignored the call for the W. H. Rogers line which would have likewise extended the South line East 66 feet and closed the survey. After disregarding the W. H. Rogers line the Honorable Circuit Court then stated that its opinion was not in conflict with *Garrison v. Crowell, 67 Texas 626, 4 S. W. 69*, because "In the description there involved, a measurement did, as here, fall short of the adjoinder's line as called for, but the next call was for another corner on this adjoinder's line, showing that the call for the line and not the measurement was correct. By allowing the calls for lines and corners to prevail over the measurements, the deed was consistent with itself; but confusion would have re-

sulted if the short measurement had been followed instead." The call for the Davis corner in the case at bar was as controlling and conclusive as was the call for an adjoinder in the Crowell case, and in law it matters not that in the Crowell case, another adjoinder was called for along the line.

In the motion for rehearing (R. 336-337) petitioner called the court's attention to the fact that there was a call for another adjoinder after leaving the Wiley Davis Northeast corner, being the W. H. Rogers line which would have extended the South line of the Survey 66 feet and resulted in reaching the point of beginning, but the court, in a written opinion, overruled the motion, stating that it did not regard the W. H. Rogers' line as another fixed object because the line originated in and was a part of the partition survey and therefore, not having existed before, could not be considered a controlling monument.

In an effort to distinguish the case at bar from the *Crowell* case, the court violated the most fundamental rule of law in Texas that all corners created by a partition belong to each tract, and each corner so created and called for must be accepted as controlling in locating the various tracts. Lots constituting a block must not be treated as separate and individual ones, nor can each lot be located independently of the rest by its own individual lines or calls for courses and distances, but all lots are to be located together as one block or one large tract in so far as they call for each other.

In *Standefer v. Vaughan (Tex. Civ. App.), 219 S. W. 484,* the Texas rule that lines and corners in a

block or system of surveys belong as much to one block or section as another therein, is clearly stated as follows:

> **"In arriving at the true location of block 1, G. C. & S. F., we think the conditions and circumstances surrounding its location, as well as the lines actually run by the surveyor, and the corners fixed upon the ground, should be taken in consideration to ascertain, if possible, his intent in placing block 1. We believe it is an established and recognized rule of our courts that marked lines and corners in a block or system of surveys belong as much to one block or section as to another therein. The Supreme Court of the United States, through Justice Lamar, in speaking of the rule that prevails in Pennsylvania, in the case of Clement v. Packer, 125 U. S. 327, 8 Sup. Ct. 915, 31 L. ed. 728, said:**
>
> **" 'By the settled laws of Pennsylvania applicable to the location of surveys, original marks and living monuments on the ground constitute the survey, and they are the highest proof of its true location. The next most important evidence of location is the calls for adjoining surveys; and in the absence of both of them, and then only, the lines according to courses and distances returned by the surveyor into the land office determine the location. But it is equally well settled by an unbroken current of decisions in that state that the surveys constituting a block are not to be treated as separate and individual surveys; nor can each tract be located independently of the rest, by its own individual lines or calls or courses and distances, but such surveys are to be located together as one block or one large tract. If lines and corners made for such blocks of surveys can**

be found upon the ground, this fixes the location of the block, even to the disregard of the call for adjoinders. The lines and corners found upon any part of the block of surveys belong to each and every tract of the block, as much as though they do to the particular tract which they adjoin'." (219 S. W. at page 489.)

The same rule is announced and followed in *Brooks v. Slaughter (Tex. Civ. App.), 218 S. W. 632; Longoria v. Shaffer, 77 Tex. 547; 14 S. W. 160; Booker v. Hart, 77 Tex. 146; 12 S. W. 16; Bell v. Preston (Tex. Civ. App.), 47 S. W. 375,* and many other authorities cited in *7 Tex. Jur., Sec. 28, page 152 et seq.*

While it is true that the W. H. Rogers deed did not call for an object on the ground at the point where the J. F. Rogers deed called for the W. H. Rogers line, it is also true that the W. H. Rogers deed did not call for an object on the ground at its Northwest corner where the J. F. Rogers deed called for the beginning point. However, the rule in Texas is that a call for an unmarked line will control course and distance if its location can be determined accurately from identifying corners of adjoining surveys, the line in such case possessing the dignity of an artificial object. *7 Tex. Jur., Sec. 47, p. 185; Maddox v. Turner, 79 Tex. 279, 15 S. W. 237; Stanolind Oil & Gas Co. v. State, 129 Tex. 547, 101 S. W. 801,* and *Van Camp v. Gulf Production Co., 122 Tex. 383; 61 S. W. (2d) 773.*

If the Circuit Court of Appeals subsequently follows its opinion the result will be a breaking loose of

all adjoinder ties in partition deeds where such adjoinders have been created by the partition and have not existed before.

It cannot reasonably be said that W. H. Rogers' corner must be accepted as a beginning point, and then the W. H. Rogers' line disregarded when called for thereafter, for the reason that the two calls for adjoinder with the W. H. Rogers tract are of equal dignity, created at the same time, by the same surveyor, the same parties, and in the same instrument. If the Honorable Circuit Court correctly held that should the call for the Wiley Davis Northeast corner be accepted the survey would not close because the call for the W. H. Rogers line would not control since it had not existed before the partition but was created in it, then it necessarily follows axiomatically that W. H. Rogers' Northwest corner would not control as the beginning point, for it likewise was created in the partition and had not existed before. If neither of the W. H. Rogers corners fixed in the partition deed could be considered controlling monuments because they had not existed before, there would be only one way to locate the J. F. Rogers tract from the field notes contained in his deed and petitioner's lease and that would be by accepting as controlling the call for the Wiley Davis Northeast corner, the only adjoinder existing before the partition and from such corner constructing the balance of the survey by courses and distances, disregarding the two W. H. Rogers corners. Under such construction, title to the 66 foot strip vested in J. F. Rogers and petitioner, subject to the easement for road purposes. A survey may be con-

structed from any well established point or corner found on the ground, and hence a beginning corner is of no greater weight or importance than any other point or corner which is as well established and identified. All corners found are of equal importance. *7 Tex. Jur., Sec. 26, page 149; Rand v. Cartwright, 82 Tex. 399, 18 S. W. 794; Montague County v. Clay County Land and Cattle Company, 80 Tex. 392, 15 S. W. 902.*

III.

There is a conclusive presumption in Texas after the rights of a bona fide purchaser have intervened, that the whole of a tract of land is partitioned unless some portion thereof is expressly excepted.

The 66 foot strip was not expressly excepted from the partition but it was included by the call for the Wiley Davis Northeast corner. Petitioner was a bona fide purchaser and had the Federal Court followed the presumptions attended with the purchase of land in Texas it would have held petitioner acquired title to the 66 foot strip. In *Gulf Production Company, et al v. Baton (Tex. Civ. App.), 108 S. W. (2d) 960,* the court said:

> *"This is not alone true by virtue of the existence of the agreed boundary line, but because the presumption obtains in this state that, where a tract of land is partitioned among the joint own-*

ers, the whole of said land is partitioned unless some portion thereof is expressly excepted, and especially does this presumption obtain in cases similar to the case at bar. And this presumption becomes conclusive when the rights of innocent purchasers are involved. Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391." (108 S. W. (2d) at pages 965-966.)

IV.

There was no latent ambiguity in the partition deed.

After the Honorable Circuit Court had disregarded the call for the W. H. Rogers line it held there was a latent ambiguity in the partition deed requiring construction and it concluded that without parol evidence it appeared that the call for 440 yards was correct and the Davis corner in error. There is no latent ambiguity in the deed when the call for the W. H. Rogers line is accepted, even though the distance of the South line will be 66 feet greater than given in the partition deed. The Circuit Court held that a latent ambiguity did not exist because the Davis corner was 66 feet further than 440 yards and for the same reason it should have concluded there was no ambiguity in the South line because the distance to the W. H. Rogers line was 66 feet greater than given in the partition deed. Excess of distances in the *Crowell* case did not create an ambiguity justifying the court in stopping the boundaries at the distances

given, although the surveyor, by a mistaken belief as to the location of the adjoinder, marked his line at the distances given. The deeds called for the adjoinder and not the objects set by the surveyor, and the court held a bona fide purchaser acquired the title to the adjoinder.

The rule in Texas is that if an instrument is so worded that it can be given a definite legal meaning or interpretation, it is not ambiguous and parol evidence is not admissible to render the instrument ambiguous. The rule obtains, even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, discloses the intention of the parties. *Lewis v. E. Texas Finance Co. — Tex. —; 146 S. W. (2d) 977.* In that case the instrument omitted one call and it contained the clause "not including the road" but the court held the description was unambiguous and parol testimony was not admissible to show that the parties intended to retain a long, narrow strip next to the tract conveyed.

A latent ambiguity was held not to exist in *Miller v. Southland Insurance Company (Tex. Civ. App.), 68 S. W. (2d) 558*, in which the facts show that P. E. Miller conveyed to Athens Pottery Company, a joint stock association, the following described tract of land:

> "Beginning at the Southwest corner of said Large Lot No. 4;
>
> "Thence North 228 feet a stake for corner;
>
> "Thence in an Easterly direction with the

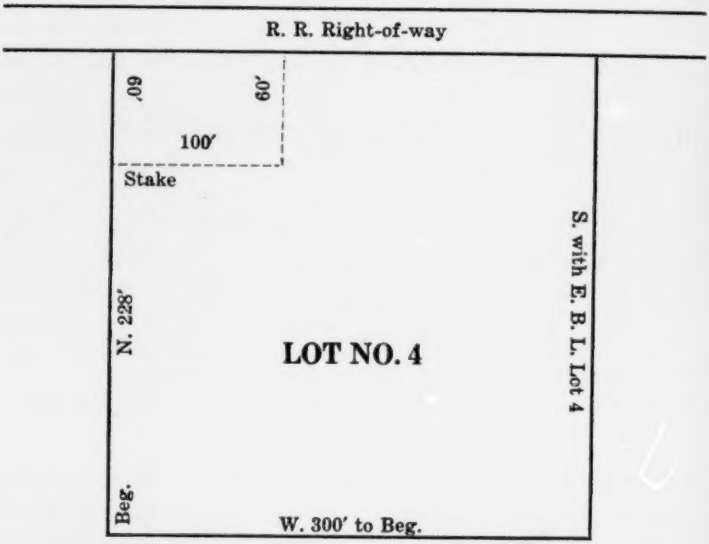
South boundary line of the right of way of the T. & N. O. RR. Co. to a point where said right of way intersects the East boundary line of said Large Lot No. 4, a stake for corner;

"Thence South with the East Boundary line of said Large Lot No. 4, to the Southeast corner of same;

"Thence West 300 feet to place of beginning." (P. 559.)

Later, the Athens Pottery Company, a joint stock association, conveyed by the same description to the Athens Pottery Company, a corporation. The Athens Pottery Company, a corporation, then conveyed to M. K. Miller the land by the same description as in the foregoing deeds. M. K. Miller then conveyed the land by the same description to H. B. Seay in trust to secure payment of certain notes in favor of Southland Life Insurance Company. P. E. Miller, the original grantor, sued the Southland Life Insurance Company to recover a tract 60 feet x 100 feet out of the Northeast corner of the tract conveyed, contending that the field note description did not cover said tract. On the trial of the case Miller testified that he and his surveyor laid out the tract at the time of the conveyance to the Athens Pottery Company and they had begun at the Southwest corner and measured North 228 feet to a point 60 feet South of the right of way and set a stake and then they had run Easterly paralleling the right of way 100 feet and then North 60 feet to the right of way, leaving a lot 60 x 100 feet in the corner for his home. He testified that he had no intention to include the lot in the conveyance to the Athens Pot-

tery Company. The plat below illustrates the location of the tract 60 x 100 feet with reference to the larger tract.



Miller sued to reform the deed to the Athens Pottery Company and the deed of trust by excluding the tract 60 x 100 feet. *The evidence showed that the call "thence North 228 feet a stake for corner" did not reach the railroad right of way.* This call did not call for the railroad right of way but actually called for a stake. The next call was "*then in an Easterly direction with the South boundary line of the right of way of the T. & N. O. R. R. Co. to a point where said right of way intersects the East boundary line of said large lot No. 4, a stake for corner.*" It was Miller's contention that since the called distance of 228 feet did not

reach the right of way by 60 feet the deed was ambiguous and parol testimony was admissible to show that the surveyor stopped at 228 feet and then went East and North, cutting out the lot 60 x 100 feet. It is to be noted that the deed actually called for a stake at 228 feet. The trial court instructed a verdict against Miller and the Court of Civil Appeals on an original hearing reversed and remanded the case but on rehearing affirmed the case after its attention had been called to the *Crowell* case.

In its original opinion the Court of Civil Appeals held that extrinsic evidence was admissible to show the footsteps of the surveyor and to determine which of the conflicting calls controlling effect should be given. In other words, it followed the same rule concerning construction of deeds that the Circuit Court announced in the case at bar, using this language:

> "The question which first arises in this case is one of boundary. It arises out of the fact that the west line of the land in controversy measured from the southwest corner of lot 4 north to the Texas & New Orleans right of way is 288 feet in length, whereas the distance call of the west line of the tract conveyed by P. E. Miller by deed dated June 13, 1920, is 228 feet.
>
> "In this connection appellees invoke the rule often applied that a call for the line of an adjoining survey will prevail over a distance call. They invoke this rule as applicable in view of the call in their field notes for the south boundary line of the right of way of the Texas & New Orleans Railroad Company.
>
> "Rules for ascertaining boundaries are for the

purpose of carrying out the intention of the parties, which intention is to be ascertained upon the face of the grant, read in the light of the surrounding facts and circumstances. It frequently happens that the description of land contained in a deed is consistent upon its face, but when it is attempted to be applied upon the ground inconsistencies in the calls develop. In such cases controlling effect is always given to the call which will give effect to and carry out the intention of the parties and the call inconsistent with and which will defeat that intention is rejected as false regardless of the comparative dignity of the conflicting calls. The rules of comparative dignity of calls are merely helpful in determining to which of the conflicting calls controlling effect shall be given. 7 Tex. Jur. Title Boundaries, secs. 5, 33, 34." (Id. p. 561.)

"It seems that the only lines actually run are those referred to by Miller and Hable. According to Miller's testimony, corroborated by Hable, the stake called for at a distance of 228 feet north of the southwest corner of lot 4 was established as a corner of the land to be conveyed and marked by an iron stake. The distance called for —228 feet—was the correct distance. It was not a mistaken call and to arbitrarily extend the west line to the right of way line by virtue of the second call in the field notes is not permissible. To do so would be to disregard the distance call of a line actually surveyed and a corner established by an artificial monument, the location of which can be definitely determined.

"The north corner of the west line as established upon the ground and marked by a stake

at a distance of 228 feet north of the southwest corner of lot 4, and 60 feet south of the Texas & New Orleans right of way, controls." (Id. p. 561.)

"The trial court evidently assumed that as a matter of law the call for the Texas & New Orleans right of way controlled the distance call of the west line, but upon the facts shown 'the question was not purely one of law, to be decided according to the precedence to be given to the different calls, but was a mixed question of law and fact, in determining which, both the rules of law and the evidence as to the foot steps of the surveyor were to be considered.' Castleman v. Pouton, 51 Tex. 84.

"Upon no other theory can the peremptory charge in favor of the insurance company be sustained." (Id. p. 562.)

On rehearing attention was called to *Garrison v. Crowell*, and after a study of the case, the motion was sustained and the case affirmed. The court quoted at length from this leading authority and said:

"In the present case the residence in the northwest corner of the tract burned some time before the insurance company acquired its lien. M. K. Miller, the borrower, was in possession of the entire lot from the railway south to the south boundary line. Miller had constructed buildings along the whole of the west line of the property. Appellants' representative inspected the property and there was nothing in its physical aspect or in its occupancy which could have put the insurance company upon notice of any claim adverse to M. K. Miller. Under these circumstances and

> **the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute; and, since the jury found the property had been abandoned as a homestead at the time it was conveyed to M. K. Miller, the judgment in favor of the insurance company should be affirmed."** (Id. p. 563.)

Another case holding that a purchaser of a tract of land with boundaries fixed in a deed by calls for adjoinders, takes a legal title that cannot be defeated by an equitable title based on an alleged mistake in calling for adjoinders, is *Swann v. Mills (Tex. Civ. App.), 219 S. W. 850 (writ dismissed).* In that case the Neil Survey's West line and the Duncan Survey's East line were conterminous. Mills owning a tract in the Neil, sued Swann owning a tract in the Duncan, in trespass to try title, and the case involved the boundaries between the Mills and Swann tracts. Mills acquired title to his 153 acre tract in the Neil Survey in 1913 from Bellamy, under a deed that called for his West line to be the West line of the Neil Survey, and called for other objects, natural and artificial, and courses and distances. Bellamy had acquired title to the tract so conveyed to Mills, by a deed from Ingraham in 1910, which likewise called for his West line to be the West line of the Neil Survey. Swann, who was the defendant below, owned a tract in the Duncan Survey which was West of and adjoining the Neil Survey, and his East line was the East line of the Duncan Survey, which was also the West line of the Neil Survey and Mills tract. The evidence showed

that before Ingraham conveyed the tract out of the Neil Survey to Bellamy, a surveyor went on the ground and ran out the lines, taking the West line he ran as the West line of the Neil Survey, and the East line of the Duncan Survey. Bellamy was shown the line run and marked by surveyor Pogue. The line the surveyor ran was not the true West line of the Neil Survey, the East line of the Duncan Survey, the East line of the Swann tract, but was some distance East of the true line. The surveyor's field notes were embodied in the deeds from Ingraham to Bellamy and Bellamy to Mills. Swann sought to confine Mills, the plaintiff, to the line surveyed and marked by the surveyor, while Mills claimed title to the true West line of the Neil Survey, the East line of the Duncan Survey, in accordance with the call for such adjoinder in his deed. It necessarily followed that if the surveyor was mistaken in the true location of the West line of the Neil Survey, running his surveyed line to the East thereof, the field notes in the deeds incorporating his survey were out of balance for the distances given would not be sufficient to reach the West line of the Neil Survey in its correct position. The court held that in locating Mills' tract he was not confined to the line run by the surveyor, or to the distances given, but acquired the legal title to the adjoinder called for (Neil Survey's West line) wherever it was located, and he was not charged with notice of any equitable claim of Bellamy to a strip between the line run by the surveyor and the Neil Survey's true West line.

The court said that both deeds called for the Neil West line, and neither called for objects, natural or

artificial, which conflicted with the true Neil line as originally established, and concluded: **"We then have field notes in which there is neither a patent or a latent ambiguity as to that boundary."** Under this authority, incorrect distances do not create a latent or patent ambiguity, for certainly the distances given in the field notes between the Neil West line and the creek and other objects called for in the deed were incorrect, when the Neil West line was properly located in the Western position, because the distances were based on an incorrect location of the Neil West line. The Court said:

> "The proposition relied on by the appellants is that, where a tract of land is sold with reference to a survey made at the time, the footsteps of the surveyor determine the true boundaries and mark the limits of the land intended to be conveyed. The correctness of that statement as the general rule in the location of boundaries need not be disputed. But its application to particular cases must be controlled and modified by other rules equally as well established. Assuming, as the charge requested does, that the evidence was sufficient to justify a finding that, when Bellamy purchased from Ingraham, Pogue surveyed and established as the west boundary a line east of the true west boundary line of the Neil survey, and that Bellamy understood and accepted that as his line, there are other facts in this case to be considered which make improper the rendition of a judgment in favor of the appellants based upon such finding; it will be observed that in both deeds—that from Ingraham to Bellamy and from Bellamy to Mills—the west boundary line

of the Neil survey is called for, and is the first call mentioned, as the west boundary line of the land conveyed. Neither of those deeds calls for any objects, natural or artificial, which conflict with the true Neil line as originally established. We then have field notes in which there is neither a patent or a latent ambiguity as to that boundary. If we rely upon the language which the parties incorporated in the written conveyances introduced in evidence, and which are not attacked as incorrect, Bellamy and Mills both purchased to the true Neil west boundary line. The rule is well settled that in such cases the written description controls." (P. 852.)

"It may be that in a contest between Ingraham and Bellamy, or one claiming under Bellamy with notice, Ingraham would, upon a proper showing, have a right to restrict the purchaser to the line surveyed by Pogue. But in order to do so he would be required to allege and prove a mistake in the field notes of his deed. Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed." (p. 852.)

V.

Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266; Booth v. Upshur, 26 Tex. 64; State v. Sullivan, 92 S. W. (2d) 228, and Blake v. Pure Oil Company, 100 S. W. (2d) 1009, cited by the Circuit Court of Appeals, are not applicable because they do not involve the construction of deeds after the rights of bona fide purchasers have intervened.

Several Texas cases hold that as between the original parties or between parties with notice, parol evidence is admissible to show that a call for an adjoinder or an object on the ground was made by the surveyor's mistake as to its location, but such rule is inapplicable when the rights of a bona fide purchaser have intervened. In *Garrison v. Crowell, supra*, the court stated it was immaterial that the adjoinder was called for by mistake and the survey stopped at the distance given in the deed because the rights of a bona fide purchaser had intervened and he was entitled to all land between the adjoinders.

Miller v. Lemm, 276 S. W. 211, cited by the court as supporting its holding that in case of an ambiguity parol evidence was admissible to aid in the construction of the deed, involved a patent ambiguity.

We respectfully submit that the Honorable Circuit Court, in applying the rule that "the footsteps of the surveyor must be followed to carry out the intention

of the parties," has fallen into the same error that the Texas Court of Civil Appeals did in the original opinion in *Miller v. Southland Life Insurance Company*, supra, in which case, after the court's attention had been called to the fact that the rules announced in the original opinion did not apply after the rights of a bona fide purchaser had intervened, it granted the motion for rehearing, reversed its previous decisions and followed the calls for adjoinders. In its original opinion the Texas Court of Civil Appeals said:

> **"It frequently happens that the description of land contained in a deed is consistent upon its face, but when it is attempted to be applied upon the ground inconsistencies in the calls develop. In such cases controlling effect is always given to the call which will give effect to and carry out the intention of the parties and the call inconsistent with and which will defeat that intention is rejected as false regardless of the comparative dignity of the conflicting calls. The rules of comparative dignity of calls are merely helpful in determining to which of the conflicting calls controlling effect shall be given. 7 Tex. Jur., title Boundaries, secs. 5, 33, 34."** (68 S. W. (2d) at page 560.)

The similarity of the opinion in the case at bar to that of *Miller v. Southland Life Insurance Company*, as above set forth, is so evident that we repeat the quotation from *Johnson v. Archibald*, used by the Honorable Circuit Court in its original opinion as an authority:

> "Certain calls, such as for natural objects,

> marked lines and corners, being less likely the result of mistake, in the absence of other evidence prevail over calls for course and distance; but the survey actually made is in legal contemplation the true survey, and it is always competent to show by any legal evidence where the lines were in fact run on the ground. It follows therefore that whenever the evidence is sufficient to induce the belief that the mistake is in the call for natural or artificial objects and not in the call for course and distance, the latter will prevail and the former will be disregarded."

However, in *Miller v. Southland Life Insurance Company*, when the court's attention was called to the holding in *Garrison v. Crowell* that after the rights of a bona fide purchaser had intervened the footsteps of the surveyor would not be followed if they were not to or along the adjoinder called for, the court granted a rehearing and reversed its previous opinion, quoting at length from *Garrison v. Crowell* and concluding:

> **"Under these circumstances and the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute; and, since the jury found the property had been abandoned as a homestead at the time it was conveyed to M. K. Miller, the judgment in favor of the insurance company should be affirmed."** (68 S. W. (2d) at page 563.)

VI.

It will not be presumed that a party granting land intends to retain a long, narrow strip next to one of his lines if the courses and distances approximate closely to the line of the tract owned by the grantor.

The distances of the lines in the patent were given as 1760 yards (1900.8 vrs.) and each subsequent instrument in the chain of title to the East half of the survey gave distances of 880 yards. The East half carried an excess East and West of approximately 22 yards. When the partition deed was prepared in 1899 the distance given between the Northeast and Northwest corner of the East half was 880 yards, exactly as such distance had been given in each previous instrument.

In *Livingston Oil & Gas Co. v. Shasta Oil Co. (Tex. Civ. App.) 114 S. W. (2d) 378 (writ dismissed)*, the court, in holding the strip was a part of the land covered by the prior lease, said:

> *"Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor —especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held—it will be presumed that the lines men-*

tioned are intended to reach the corners and run with the lines of the tract, though the trees marked and described have disappeared before the making of the deed. Western Min. & Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406; cited with apparent approval in the Shell Petroleum Corporation v. Landers, Tex. Civ. App., 107 S. W. (2d) 509, at page 512."

Because of this fact petitioner should have been protected in the calls for adjoinders and the distances should have been disregarded.

VII.

Course controls distance and even if the call for the W. H. Rogers line be disregarded, no latent ambiguity exists because the survey will close.

In *Livingston Oil & Gas Company v. Shasta Oil Co. (Texas Civil Appeals), 114 S. W. (2d) 378 (writ dismissed)*, the court held that the course of one line will control the distance of another. Even though the call for the W. H. Rogers line is disregarded and the call for the Davis corner is accepted, nevertheless the survey will close because the most Northerly South line must be extended to a point South of the Northeast corner of the J. F. Rogers tract, the place of beginning, thereby letting the course of the East line of the tract control the distance of the most Northerly South line. This point was definitely decided in *Liv-*

ingston Oil & Gas Co. v. Shasta Oil Co., supra, and the deed in that case was held unambiguous.

VIII.

After the intervention of the rights of a bona fide purchaser, parol evidence is not admissible to prove that a surveyor set objects not called for in the deed, when the location of such objects conflict with the adjoinders called for; nor is parol evidence admissible to prove that adjoinders were included in the deed by mistake.

The Honorable Circuit Court held that since there was a latent ambiguity, parol evidence was admissible to show that the Rogers heirs did not intend to include the strip in the partition and erroneously called for the Wiley Davis Northeast corner. The trial court held that parol evidence was admissible to prove the surveyor in 1899 set stakes, although not called for in the deeds, at places different from the adjoinders called for in such deeds. (R. 68 ¶ 16.)

We respectfully submit that under *Garrison v. Crowell, Miller v. Southland Life Insurance Company* and *Swann v. Mills, supra,* this testimony was inadmissible as against petitioner, a bona fide purchaser.

The locations of objects found on the ground, but not called for in field notes, are inadmissible in fixing boundaries of a tract of land, particularly when such

objects conflict with field notes. *Reast v. Donald, 84 Tex. 648, 19 S. W. 794; Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857 (writ dismissed).*

IX.

Disregarding for the moment the call for the Wiley Davis Northeast corner, and construing the deed according to Texas decisions, title to the road passed to J. F. Rogers and petitioner subject to the easement, because the land described went to and was bounded by the road, and the deed and lease did not expressly reserve title in grantors and lessors. Parol evidence was not admissible to show the grantors intended to reserve title to the road, or set stakes not called for in their deeds. The Texas decisions create rules of property to be followed by Federal Courts.

The Honorable Circuit Court in its opinion stated:

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road."

This being true, the called distance of 440 yards ex-

tended to the edge of the strip of land the heirs set aside for a road, and title to the road passed to J. F. Rogers because the partition deed contained no express reservation of the road in grantors. **An unexpressed intention to reserve title is not sufficient; the reservation must be in the deed.** The Circuit Court, after holding that under settled rules of law a conveyance of land adjoining a road will carry the grantor's title to the servient fee of the road because of the presumption based on public policy that parties would not reserve a long narrow strip for which they had no use, then erred in holding that "if the intention to do so is clear (meaning reserve title to the road) the contrary presumption must yield," for the court failed to limit the exception to the rule to **"an intention expressed in the instrument."**

The court likewise erred in holding "There is a plainly **expressed** intention not to add the strip to Lot No. 2 but to retain joint control and ownership. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a **reservation** of the land * * *." If there was no occasion to make a reservation of the land in the deed to J. F. Rogers (and none was made), see deed (R. 105), then there was no "expressed intention" in the deed not to add the strip to Lot No. 2.

A purchaser from the heirs of J. F. Rogers and their lessees, such as was petitioner, could not glean from the partition deed and the oil and gas lease subsequently acquired by petitioner, that the four Rogers heirs intended to reserve title to the road, particularly in light of the fact that each of these instruments

contained a call for the Wiley Davis Northeast corner, which in itself would have included the road, and the called distance of 440 yards extended to the edge of the large public road in use when the lease was executed, and no mention was made in the instrument of a reservation of title to the road. Any intention on the part of the Rogers heirs to reserve title to the road must be gathered from the conversation they had in 1899 when the survey was being made and not from the deed.

Authorities holding title to road passes unless expressely reserved in the deed.

One of the earliest Texas cases is that of *Mitchell v. Bass (1862), 26 Tex. 372*, wherein the court said:

> "The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the center of the road, as part and parcel of the grant. **Such is the legal construction of the grant, unless the inference that it was so intended, is rebutted by the express terms of the grant.** The owners of the land on each side, go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Upon the discontinuance of the highway, the soil and freehold revert to the owner of the land." (p. 380.)

In *Cantley v. Gulf Production Co., — Tex. —, 143 S. W. (2d) 912*, the court held:

> "In the recent case of Cox v. Campbell, Tex. Sup., 143 S. W. (2d) 361, this Court reviewed

this question and the decisions relating thereto and reiterated the following general rule: 'The rule has been definitely announced in the Warwick and Weed cases that where a deed conveys by specific field notes land abutting on a street or public highway or railroad right of way, it conveys title to the property to the center of the street, public highway, or railroad right of way; and such rule is not overcome even though the field notes describing the land stop at the side line of the street, public highway, or railroad right of way, unless a contrary intention is expressed in plain and unequivocal terms." (at page 915.)

In *Texas Bitulithic Co. v. Warwick (Tex. Com. App.), 293 S. W. 160*, the court said:

" 'This court has approved the doctrine that to exclude half of the highway from a conveyance the grantor must make his purpose to exclude clear by **express declaration,** or equivalent of express declaration, **in the instrument.**' In the case of Tousley v. Galena M. & S. Co., 24 Kan. 328, the opinion was written by Justice Brewer, later of the United States Supreme Court. In the Galena case he held that, unless the road or street be expressly excluded, the grantee takes to the center thereof." (pp. 162-163.) * * *

"We quote as follows from the case of Marsh v. Burt, 34 Vt. 289:

" 'Parties have the right to make their conveyances as they choose, and when the intention to exclude the highway is clear, explicit and unequivocal, it is the duty of the court to carry out their intention, but **when the language is such that by a fair construction the intent is doubtful,**

> **it is the duty of the court to resolve that doubt so as to give to the deed the effect of conveying the land to the center of the highway.'** (p. 163.)" * * *

> "Therefore we think the courts are exactly right when they say that a deed does carry the property to the center of the adjoining street unless such deed contains a clause which **expressly declares the contrary intention** or contains some other declaration equivalent to such an express declaration. **In other words, we think that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street in front of his property, if that is the intention of the grantor. * * *.**" (p. 164.)

Mr. Associate Justice Sharp, speaking for the Supreme Court of Texas, in *Cantley v. Gulf Production Co., supra,* stated the reason for the above rule as follows:

> **"It is well known that separate ownership of long, narrow strips of land, distinct from the land adjoining on each side, is a fruitful source of litigation and disputes. To avoid this source of contention, it is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceases to be of use to him, unless such fee is clearly reserved. The reason for the rule is obvious. Where it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him, the presumption is that the grantor intended to include such strip in such conveyance; unless it clearly appears in the deed, by plain**

and specific language, that the grantor intended to reserve the strip. See Cox v. Campbell, Tex. Sup., 143 S. W. (2d) 361; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391; Texas Bitulithic Co. v. Warwick, Tex. Com. App. 293 S. W. 160. For an annotation of the decisions bearing on this question, see also 123 A. L. R. 543, 47 A. L. R. 1277, and 2 A. L. R. 7." (143 S. W. (2d) at page 915.)

In *Roxana Petroleum Corp. v. Sutter (8 C. C. A. Kan.), 28 F. (2d) 159,* the court held that the title passed to the road **"unless the intent not to do so be clearly indicated."**

The same decision was reached in *Shell Petroleum Co. v. Hollow (10 C. C. A. Kan.), 70 F. (2d) 811,* and *Roxana Petroleum Corp. v. Corn (8 C. C. A. Kan.), 28 F. (2d) 168.*

In *Lewis et al v. East Texas Finance Co., et al, — Tex. —, 146 S. W. (2d) 977,* the court held that an instrument conveying land definitely described therein, but excepting from the conveyance a road or the right of way across the land, conveyed the fee to the entire tract and the exception operated only to render the conveyance subject to the easement. In that case the deed contained the clause **"not including the road"** and the court held that the deed was unambiguous and parol evidence was not admissible to show that the grantors intended to reserve title to the road.

Texas decisions could be multiplied holding that the servient estate in roads, railway rights of way, etc., pass with a conveyance of the fee to the abutting tract of which the strip formerly was a part, unless

there is an **express reservation** in the deed, some of which cases are *Cantley v. Gulf Production Co. 118 S. W. (2d) 448; Bolton v. Dyck Oil Company, 114 S. W. (2d) 299; Weiss v. Goodhue, 102 S. W. 793 (writ refused); Gulf Sulphur Company v. Wyman, 221 S. W. 310; Gulf Production Co. v. Warren, 99 S. W. (2d) 616 (writ refused); Guadalupe County v. Poth, 163 S. W. 1050; Amerman v. M. K. & T. Ry. Co., 182 S. W. 54 (writ refused).*

Since the road was entirely laid out on land belonging to the four Rogers heirs the title to the entire strip passed to J. F. Rogers. *(9 C. J., sec. 97, p. 203; 4 R. C. L., sec. 8, p. 79; 2nd Ed. Devlin on Deeds, p. 312; Gulf Sulphur Co. v. Wyman, 221 S. W. 310, 312; Cantley v. Gulf Production Co., 118 S. W. (2d) 448, 450, affirmed — Tex. —, 143 S. W. (2d) 912.)*

The same principle is applicable **to alleys and private ways** *(Weiss et al v. Goodhue, 102 S. W. 793 (writ refused); Guadalupe County et al v. Poth et al, 163 S. W. 1050; Pecos & N. T. Ry. Co. et al v. Falls, 96 S. W. (2d) 430; Paine et al v. Consumers, Forwarding & Storage Co. et al (6 C. C. A. Ohio), 71 Fed. 626, 58 A. L. R. 238; 9 C. J., sec. 107, pg. 205),* **and applies to partition deeds** *(Amerman et al v. M. K. & T. Ry. Co., 182 S. W. 54 (writ refused); Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; Cantley v. Gulf Production Co., 118 S. W. (2d) 448),* **and the oil and gas leases** *(Rio Bravo Oil Co. v. Weed, supra; Cantley v. Gulf Production Co., supra; Bolton v. Dyck Oil Co., 114 S. W. (2d) 299 (writ dismissed); Gulf Production Co. v. Warren, 99 S. W. (2d) 617 (writ refused); Roxana Petroleum*

Corp. v. Sutter (8 C. C. A. Kan.), 28 Fed. (2d) 159), and the owner of an oil and gas lease on such servient estate can maintain an action in trespass to try title or remove cloud. (*Gulf Sulphur Co. v. Wyman,* 221 S. W. 310.)

Failure to mention road in conveyance does not militate against conclusive presumption.

The Circuit Court in holding that J. F. Rogers did not acquire title to the road under the partition deed, said: "Since the deed as prepared said nothing about a road as a boundary there was no occasion to make a reservation of the land." None of the many Texas cases cited above hold that a road remains with grantors if not called for in the deed, but on the other hand hold title passes if the called distance extends to the edge and the road is not expressly reserved in the deed.

In *Magnolia Petroleum Co. v. Caswell, 295 S. W. 653,* reversed on other grounds, *1 S. W. (2d) 597,* the Court of Civil Appeals, quoting with approval the rule as announced in *Corpus Juris,* said:

> **"It is also said that failure to mention street or highway does not prevent the above rules operating. It is thus said in 9 C. J. 199, sec. 89: 'The general rule that the grantee of land bounded by a street or highway takes to the center thereof is not affected by the fact that the land is not described in the deed as bounded on the highway, provided it is actually so bounded. The presumption that it was not the intention of the grantor to withhold his interest in a street or**

highway to the middle of it, after having parted with all his right to the adjoining land, is just as strong as if the conveyance had expressly mentioned the street or the highway as a boundary." (295 S. W. 659.)

Many cases from other jurisdictions hold contrary to the rule announced by the Honorable Circuit Court of Appeals, some of which are as follows: *9 C. J. 199, sec. 89; 11 C. J. S. 581, sec. 35A; 7 Tex. Jur. 131, sec. 11; Annotation 2 A. L. R. 6, 31, sec. Vg; 47 A. L. R. 1276, Vg; Annotation 17 L. Ed. 818; Thompson on Real Property, sec. 3202, Note 60; Magnolia Petroleum Co. v. Caswell (Tex. Civ. App.), 295 S. W. 653, 659, reversed on other grounds, 1 S. W. (2d) 597; Roxana Petroleum Co. v. Sutter, 28 Fed. (2d) 159; Merchant v. Grant, 26 Cal. App. 584, 147 Pac. 484; Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 So. 512; Bowers v. Atkinson, T. & S. F. Ry. Co., 119 Kan. 202, 42 A. L. R. 228, 237 Pac. 913; City of Springfield v. Eisenmeyer, Mo. Ct. App. 297 S. W. 460; Grant v. Moon, 128 Mo. 43, 30 S. W. 328; Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33; Cross v. Talbot, 121 Ore. 270, 254 Pac. 827; Durbin v. Roanoke Bldg. Co., 107 Va. 753, 60 S. E. 86; Norcross v. Griffith, 65 Wis. 599, 27 N. W. 606, 56 Amer. Rep. 42; Wegge v. Madler, 129 Wisc. 412, 109 N. W. 223, 116 Amer. St. Rep. 953.*

The rule is well stated in *Cross v. Talbot, 121 Ore. 270, 254 Pac. 827*, wherein the court said:

"We are of the opinion, and we take it that the weight of authority is to the effect that, where the land described by metes and bounds actually

> **abuts upon the highway, the grantee, in the absence of some clear intention on the part of the grantor to otherwise limit the description, will take to the center of the highway to the same extent that he would had the highway been actually mentioned as a boundary." (254 Pac. 828.)**

In *Van Winkle v. Van Winkle (New York Appeals 1906), 77 N. E. 33*, the court said:

> **"Where a deed gives the boundaries of the land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, but where it appears that the distance given does, in fact, carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center." (77 N. E. pp. 35-36.)**

The Circuit Court of Appeals has cited no authority supporting its holding on this question. At the conclusion of the paragraph dealing with the road it cited *11 C. J. S. "Boundaries," sec. 35 (4)*. We have examined carefully this citation and we fail to find support in the court's opinion. On the other hand the text announces a contrary rule (*11 C. J. S. "Boundaries," sec. 35A, page 581)*, citing among other cases *Cross v. Talbot*, quoted from above, stating that the general rule is the title passes even though "the land is not described in the conveyance as bounded on the highway."

It is immaterial that the travel was not over the entire 66 feet.

Even though all of the 66 foot strip was not being used as a road at the time of the partition, it was set aside for road purposes for the benefit of the heirs and their grantees and therefore title passed. Respondents pleaded that at the time the partition was made the 66 foot strip was being used as a logging road and the heirs purposely left the strip unpartitioned so that at all times they would have an open outlet. (R. 34-35 ¶ 10-11.) F. E. Rogers, one of the heirs who accompanied the surveyor, testified they were using the 66 foot strip for a road at that time of the year, they having a sawmill on their land (R. 222). He testified:

> "Since the division between the heirs and the establishment of the 440 yard corner at the North and the establishment at the corner where the gear wheel is located, **a road has been open for the use of anyone who wanted to travel it.** To my own knowledge, J. E. Rogers, Mrs. Waskom and Mrs. L. J. Rogers never claimed that road as against the children of Alexander Rogers. Up until the time the Empire filed this suit I had never known of anyone claiming this road as against us." (R. 223-224.) * * *
>
> "I have lived all my life not very far from the tract. I knew it was cleared out. **I expect the road was fifty or sixty feet wide between Dink's West fence and Davis fence in the old days."** (R. 227.)

The road was an ordinary country one, the travel-

ling public having meandered back and forth between the trees in such a way as to avoid the washes caused from heavy rains (R. 244-246). When petitioner acquired its oil and gas leases the fences were at least 60 to 70 feet apart although the road did not take up all of this area.[1] The character of the road from the time of the partition until long after the discovery of the East Texas Oil Field was described by F. E. Rogers (R. 222-224, 226-227); in fact he testified that since the partition and establishment of the corner where the gear shaft was located **"the road has been opened for the use of anyone who wanted to travel it** (R. bottom 223, top 224), and that up until the time petitioner filed the suit he had never known of anyone claiming the road against the heirs (R. top 224).

The road was further described by witnesses (Simmons (R. 244-246)[2]; Sport (R. 239-241)[3]; York (R.

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[1]Bearing in mind the Texas rule announced in *Texas Bitulithic Co. v. Warwick, 293 S. W. 160,* **"that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street of his property, if that is the intention of the grantor,"** there was nothing in the partition deed to put petitioner on such notice, and the strip was being used for road when it acquired its lease. Applying equitable principles petitioner should not suffer for defendants' mistakes.

[2]"The roads meander back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side." (R. 246.) "The road is traveled one place one time and another place another time." (R. 244.)

[3]"The fences must have been at least sixty or seventy feet apart but the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. * * * Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. I was road overseer and people went over the road. In my judgment they were

195-196); Baker (R. 123, 125, 135)[4]; and Leuty (R. 152-153).

We do not contend that since 1899 each and every square foot of the 66 foot strip has been travelled over daily. Even though at times of the year the travel was confined to the furtherest edge of the road, does not mean the strip was not a road. As defined by Webster's New International Dictionary, a road is a place where one may ride and we believe a road includes the footpaths, drainage ditches and all other portions of the area set aside for public or private use.

The Texas rule is stated in *39 Tex. Jur. "Streets," sec. 6, page 515,* as follows:

> "Nor is it essential that the public use the entire width of a dedicated street in order to preserve its rights to the same; and the fact that the street is not graded or worked or used for travel to its full width as dedicated does not affect the right of the public to use its entire width as dedicated or the effect or extent of the dedication and acceptance." *(39 Tex. Jur., p. 515, sec. 6.)*

In *Bruner Fire Co. v. Payne, 118 S. W. 602,* the Texas Court of Civil Appeals said:

> **"The effect of appellant's contention is that, to preserve its rights to a highway, the public must**

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sixty or seventy feet apart. After the fences were put there the road was widened." (R. 239-240.) * * * "It was almost in the road. The road wobbled quite a little bit." (R. 241.)

[4]"When I was there the road was about 60 feet wide and it was a well graveled and muchly traveled road at that time." (R. 123.)

> **use for purposes of travel every foot of it. This is not the law."** (p. 605.)

The Texas courts have said that the title passes, it being immaterial that the road was never opened or that it was abandoned. *(Amerman v. M. K. & T. Ry. Co., 182 S. W. 54; Texas Pacific Railway Co. v. Chandler, 20 S. W. (2d) 380; Cantley v. Gulf Production Co., 118 S. W. (2d) 448, 450; Temple v. Sanborn, 91 S. W. 1095.)*

In *Emerson v. Bedford, 51 S. W. 889 (writ refused)*, the court said:

> **"It seems, however, that these streets were never opened and used or otherwise accepted by the public; but that did not affect the rights of the subsequent grantees of the blocks, taking conveyances with reference to the streets."** (p. 890.)

In *Loud v. Brooks, 241 Mich. 452, 217 N. W. 34*, the court reviewed numerous cases where the facts showed the road had not been opened or abandoned and stated that their research had discovered only two cases holding title did not pass if the road was not opened, one being a New Jersey case and the other a Maine case. It cited many cases holding the contrary rule and held that the better rule was that a conveyance of land bounded by a highway, street or alley, carried with it the fee to the center thereof, subject to the easement, provided there were no words in the deed showing a contrary intent whether the dedication of the highway, street or alley had been accepted or not or had been opened or not.

In *Paine v. Consumers Forwarding & Storage Co. (6 C. C. A. Ohio), 71 Fed. 626,* Justice Taft said:

> "First, it is said that the principle is never applied except when there is an actual public highway forming a visible monument. The case of Hopkinson v. McKnight, 31 N. J. Law 427, is relied upon to sustain this proposition. The weight of authority is, however, decidedly to the contrary. In the case of Stark and Wales v. Coffin, 105 Mass. 328, it was held that a deed conveying part of a tract of land as bounded 'by a passageway of fifteen feet wide,' leading across the tract, with no restriction or controlling words, passes the fee to the center of the way so assumed as a monument, although no such way existed at the date of the deed, or has ever been fenced off, and although the deed provided that the passageway was to be held in common forever by the parties to the deed." (p. 630.)

X.

Federal Courts follow state courts on construction of deed, and rules of evidence.

In construing the partition deed to J. F. Rogers and the oil and gas lease held by petitioner on questions concerning the amount and location of the land conveyed the Federal Court should have followed the decisions of the Texas Supreme Court (*Kuhn v. Fairmont Coal Co., 215 U. S. 349; Massachusetts v. New York, 271 U. S. 65).* **Likewise it should have followed the decision of the state court on questions in-**

volving the admissibility of evidence (*Olcott v. Bynum, 17 Wall. 44*), **because the Texas decisions constitute rules of property** (*Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458*). **The fact this is an equitable action does not militate against the rule** (*Ruhlin v. New York Life Insurance Co., 304 U. S. 202; Mason v. U. S., 260 U. S. 545*).

It is respectfully prayed that writ of certiorari be granted and that upon hearing of this cause, the judgments below be reversed and judgment rendered for petitioner for the land involved, together with such other relief as it may be entitled to, either at law or in equity.

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CLAYTON L. ORN, one of counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

CLAYTON L. ORN